FILED
MAR 26 1997
CLERK

No. 96-1290

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

ARTHUR A. COLLINS, INC.,
Petitioner,

v.

AMERICAN TELEPHONE AND TELEGRAPH COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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REPLY BRIEF FOR THE PETITIONER

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The Brief in Opposition never addresses the straightforward logic of Collins's claim: (i) AT&T knowingly made false statements in the prior litigation; (ii) AT&T's conduct was tortious under state law; and (iii) in our federal system, a state law tort action may proceed unless it is preempted by federal law. Respondent does not point to anything—nothing in the text of Rule 60(b), nothing in any federal statute, and not a word in any of this Court's decisions—that even suggests that Rule 60(b) precludes state tort actions in these circumstances. It follows that Collins's suit should have been allowed to go forward.

Respondent's position, echoing that of the panel below, is also extraordinarily far-reaching, and implicates issues of obvious practical importance. Respondent's claim is that a state law action may not proceed if it "seeks a

determination that an earlier, final judgment of an appellate court is 'wrong' " (Br. in Op. i; see *id.* at 7). In fact, what Collins's suit "seeks" is a determination that a *party* to the earlier case—AT&T—knowingly made false statements. Justice Bradley and the first Justice Harlan, in opinions written for this Court a century ago, explained the distinction between this kind of claim and one that seeks to set aside a judgment. See Pet. 11-12; pages 3-4, *infra*.

What respondent appears to mean is that Collins's state law action, if it were to succeed, might justify an observer in concluding that the prior federal case was resolved incorrectly. This is of course true—but it is equally true of a wide variety of state law claims. A state tort claim based on, for example, intimidation of witnesses in connection with prior federal litigation, or the theft of privileged communications connected to such litigation, could also cast doubt on the correctness of the prior federal judgment. Indeed, a state *criminal* prosecution for wrongful conduct related to a prior federal lawsuit might also, if it were successful, suggest that the outcome of the federal litigation should have been different. The approach taken by respondent and the panel would dictate that, in such circumstances, state law proceedings cannot even be instituted until the prior federal judgment has been vacated under Rule 60(b). The importance of this issue to core values of federalism—and the error of respondent's position—are self-evident.

1. a. Respondent's principal argument (Br. in Op. 7-10) is a strenuous effort to show that the savings clause of Rule 60(b) does not apply to common law tort actions like Collins's but applies only to "an equitable action" (Br. in Op. 7). Of course, respondent's interpretation of the savings clause flies in the face of its plain language, which refers simply to "an independent action" and says nothing about equitable actions; and as we explained in the peti-

tion, the Advisory Committee Note specifically contemplates actions at law. Pet. 13 n.3.

But more fundamentally, the emphasis respondent places on this argument betrays the weakness of respondent's position. It is not Collins's obligation to show that some provision of federal law affirmatively authorizes this state law action. Respondent must show that federal law precludes it. Needless to say, the savings clause of Rule 60(b) does not preclude anything. Indeed its manifest intent is to establish that Rule 60(b) is not preclusive.

Both the Second and Tenth Circuits have ruled that a tort action like Collins's—in which an element of the damages is the value of a fraudulently-obtained judgment—is an independent action within the meaning of the savings clause in Rule 60(b). See pages 4-5, *infra*. But contrary to the impression respondent seeks to create (*e.g.*, Br. in Op. 8, 14), our principal argument in the petition was based not on the savings clause—which we adduced primarily to show the remarkable error of the panel's assertion about the exclusivity of Rule 60(b)—but on the basic principle of federalism that a state law tort action may proceed unless federal law bars it. See Pet. 8-10. Respondent continues to be unable to identify any federal law that bars Collins's claim.

b. Respondent tries to distinguish the three foundational decisions of the Court in this area—*Marshall v. Holmes*, 141 U.S. 589 (1891); *Arrowsmith v. Gleason*, 129 U.S. 86 (1889); and *Johnson v. Waters*, 111 U.S. 640 (1884)—by selectively quoting from portions of those opinions containing stock recitations of legal principles. Even a basic description of those three cases shows why respondent's description of them is utterly inaccurate. Those cases all involved actions in federal court alleging that fraud had been committed in prior state court proceedings; in all three, the federal plaintiff sought relief that would take away the benefit the defendant had gained from his fraudulent conduct in the state proceedings.

If respondent and the panel below were correct, the federal courts—which of course could not set aside a decree of a state court (see, *e.g.*, *Marshall*, 141 U.S. at 599)—should have refused to entertain the fraud claims until the plaintiffs had gone to state court and obtained a vacatur of the earlier state judgment. Instead, the federal courts heard the claims on the merits and granted relief. Collins's suit follows exactly the same pattern: rather than asking a court to vacate the prior judgment, it is seeking to have respondent disgorge the fruits of its alleged fraud. The fact that the plaintiffs in *Marshall*, *Anderson*, and *Johnson* invoked a federal cause of action for equitable relief, while Collins invokes a state cause of action for damages, is obviously immaterial.

As the first Justice Harlan said in *Marshall*: "While [the federal court] cannot require the state court itself to set aside or vacate the judgments in question, it may * * * take from [the defendant] the benefit of judgments obtained by fraud." 141 U.S. at 599-600. It is difficult to imagine a more explicit rejection of respondent's position or a clearer endorsement of the precise position that Collins advances here.

c. Respondent is no more successful in explaining away *Cresswell v. Sullivan & Cromwell*, 922 F.2d 60 (2d Cir. 1990), and *Robinson v. Volkswagenwerk AG*, 56 F.3d 1268 (10th Cir. 1995), cert. denied, 116 S. Ct. 705 (1996). Respondent appears to suggest that those cases involved claims for equitable relief. See Br. in Op. 10-11. They did not: both were damages actions for fraud allegedly committed in the course of prior federal litigation. *See Robinson*, 56 F.3d at 1271; *Cresswell*, 668 F. Supp. 166, 168 (S.D.N.Y. 1987). The plaintiffs in both cases, like Collins, did not seek to set aside the earlier judgment; rather, as the Tenth Circuit explained, they sought "to recover damages said to be caused by the defendants' fraud in the course of obtaining that judgment." 56 F.3d at 1272.

Neither court of appeals so much as suggested what the panel below held—that Rule 60(b) is the exclusive remedy in such a case. Instead, both courts of appeals held that these damages actions were the kinds of "independent action[s]" authorized by the savings clause of Rule 60(b)—contradicting respondent's assertion that the savings clause cannot apply to damages actions. See 56 F.3d at 1274; 922 F.2d at 70. Neither court of appeals suggested that such damages actions would be barred until the plaintiffs first sought to have the judgment vacated. The Second Circuit proceeded to the merits (922 F.2d at 71-73); the Tenth Circuit held that the suit was barred, not by Rule 60(b), but by collateral estoppel—because there had been a full bench trial on the specific issue of whether the defendant had engaged in fraud in the prior litigation. See 56 F.3d at 1275. The language from the Tenth Circuit's opinion that respondent quotes and italicizes (Br. in Op. 11), to the effect that the plaintiffs could not proceed without first obtaining relief from the judgment, is explicitly linked, in the opinion, to the finding of collateral estoppel.[1]

d. Respondent also appears to suggest that Collins brought this suit as a tort action in order to avoid certain "requirements" or "showings" that, respondent asserts, Collins "cannot make." Br. in Op. 8, 15.[2] The short

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[1] The full sentence from the opinion reads (56 F.3d at 1273; emphasis added):

> *Given this inconsistency*, we think the trial court was correct insofar as it concluded that plaintiffs could not pursue their claims for damages without first obtaining relief from the judgment.

Respondent omits the phrase "[g]iven this inconsistency" (Br. in Op. 11). The "inconsistency" is between the plaintiffs' claims and findings of fact by a jury. See 56 F.3d at 1273.

[2] Of course, if the state tort law on which Collins relies is inconsistent with some particular provision of federal law or thwarts a significant federal interest, the state cause of action would have to be modified or limited in that specific respect. Cf. *Boyle v. United*

answer is that this goes to the merits of Collins's claim, and that Collins would welcome an opportunity to make any "showings" that might conceivably be required about the falsehood of respondent's statements concerning the Granello article.

In any event, in hypothesizing the "requirements" that Collins supposedly could not meet, respondent asserts that Collins must show a " 'fabrication' " and "the Granello article is not a fabrication but an indisputably *bona fide* publication." Br. in Op. 8-9 (citation omitted). But of course Collins's contention is not that the Granello article is a fabrication but that respondent deliberately made false statements about the article. Respondent also asserts that "Collins can[n]ot show materiality, because the Federal Circuit based its finding of invalidity not only on the Granello article, but on two other prior art references" (Br. in Opp. 8-9). As we explained in the petition, this argument has been explicitly rejected by this Court. *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 246-47 (1944), quoted at Pet. 22 n.10.

2. Respondent, like the panel below, treats the collateral estoppel issue briefly and in a superficial and inaccurate way, confirming that the panel's remarks about collateral estoppel were not, as respondent asserts, an "alternative ruling" (Br. in Op. i) but rather simply a byproduct of the panel's conclusion that Collins was not entitled to bring a tort action at all.

a. Respondent asserts that "[d]uring the trial in th[e] prior litigation, respondent maintained * * * that claim 29 of Collins' patent was invalid in light of [the] article written by Guido Granello" (Br. in Op. 2). This statement is false. Respondent cites nothing in the trial record to support it. (Respondent's citations for that proposition are our petition and the complaint, both of which, of

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Technologies Corp., 487 U.S. 500, 507-13 (1988). But that is a far cry from saying the state claim may not be brought at all.

course, say the opposite.) Respondent simply did not raise the Granello defense at trial. In fact, as we said in the petition (Pet. 3)—and as respondent conspicuously does not dispute—respondent's trial counsel explicitly disclaimed reliance on Granello in closing argument.

b. Respondent asserts (Br. in Op. 13) that the Federal Circuit "necessarily determined" that AT&T's statements about Granello "were not false but true." While the Federal Circuit did, of course, accept AT&T's representations about Granello, this is not enough to establish collateral estoppel. As this Court has repeatedly said, there is no collateral estoppel unless Collins had "a 'full and fair opportunity' to litigate" the question whether those representations were fraudulent. *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 480-81 (1982) (citations omitted); see also Pet. 19 (citing cases).

There were only two points at which this question could possibly have been addressed in the earlier case. The first was when AT&T made its representations about the Granello article in its opening brief in the Federal Circuit—at which point Collins pointed out that the entire argument had been waived in the district court. The second was in the petition for rehearing. At that point the Federal Circuit not only denied rehearing but explicitly refused even to consider five letters that Collins produced, written without compensation by experts of unquestionable stature in the profession, that demonstrated the falsehood of AT&T's statements.

The Federal Circuit, therefore, simply accepted AT&T's representations about the Granello article, without any trial record, any expert testimony, or any cross-examination on this highly technical subject. Against this background, it is manifest that Collins has never had "a 'full and fair opportunity' to litigate" its claim that those representations were false. Collins has never had a hearing on the

question of fraud, even though the law is clear that fraudulently obtained judgments have no preclusive effect. *E.g.*, Restatement (Second) of Judgments § 70 (1982). We know of no decision suggesting that collateral estoppel is appropriate in this situation, and this is no doubt why the discussions of collateral estoppel by both the panel and respondent are so cursory.[8]

3. The Brief in Opposition is eloquent testimony to the injustice of the award of sanctions in this case. Respondent is forced to devote all of its attention to explaining away the abundant sources that show that a suit like Collins's is entirely permissible and appropriate: the language of Rule 6(b); decisions of this Court; and decisions of at least two other circuits. If Collins's claim were as insubstantial as respondent and the panel below suggest, then surely there would be something—some rule; some statute; some decision of this or some other court—that would say as much. Neither respondent nor the panel identifies anything of the kind.

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[8] Respondent cites (Br. in Op. 13) *Harris Trust & Sav. Bank v. Ellis*, 810 F.2d 700, 705 (7th Cir. 1987), but it is unclear why respondent does so. *Harris Trust* did not involve either an argument that was waived in a lower court or a petition for rehearing. In fact, as we said in the petition (Pet. 20 n.8), the Seventh Circuit has suggested that a party who asserts that an argument was waived in the district court *cannot* then argue the merits, or it will relinquish its waiver claim. See *Doherty v. City of Chicago*, 75 F.3d 318, 324 n.2 (7th Cir. 1996).

For these reasons and the reasons stated in the petition, the petition for a writ of certiorari should be granted as to all the questions presented, and the award of sanctions should be summarily vacated.

Respectfully submitted,

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